Filed 2/25/05 P. v. Anderson CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VACHON ANDERSON, Defendant and Appellant.	H027348 (Santa Clara County Super. Ct. No. CC327481)

Defendant Vachon Anderson appeals a judgment after jury trial in which he was convicted of second-degree robbery with a firearm and being an ex-felon in possession of a firearm. Defendant asserts the following errors on appeal: (1) the evidence at trial was insufficient to support a finding that defendant possessed a real firearm; (2) defendant was denied effective assistance of counsel by his attorney's failure to request a limiting instruction related to defendant's prior conviction; (3) defendant's sentence violated both Penal Code section 654, and (4) the prohibition against the use of untried facts to support an upper-term commitment pursuant to *Blakely v. Washington* (2004) 542 U.S.__ [124 S.Ct. 2531] (*Blakely*).

For the reasons set forth below, we reverse the judgment for the limited purpose of re-sentencing, and remand the matter to the trial court.

STATEMENT OF THE FACTS AND CASE

This case involves the armed robbery of a Blockbuster Video store in San Jose. In September 2003, Vanessa Villagrana was working when defendant entered the store. Defendant browsed the store, and eventually approached the cash register with movies he wished to buy. Ms. Villagrana attempted to process the sale, but had a problem calculating the price on the register, so she asked another cashier, Jennifer Salazar to help her.

Defendant purchased four DVD movies with cash, and Ms. Salazar gave him 57 cents in change. Just as the transaction was complete, and Ms. Salazar was in the process of closing the cash drawer on the register, defendant told Ms. Salazar to put the money in the bag. Ms. Salazar believed defendant meant his 57 cents in change, so she closed the cash drawer.

Defendant told Ms. Salazar to open the drawer again, but Ms. Salazar did not comply. Defendant then pulled a gun partially out of his right pants pocket exposing the handle and a small portion of the barrel. Ms. Salazar focused on the gun, and believing that it was real, she opened the cash drawer and removed approximately $200 in bills.

Ms. Salazar did not immediately hand the money over to defendant, but stood there for a moment. Ms. Villagrana saw Ms. Salazar back away from the register and tilt her head in defendant's direction.

Defendant then pulled the gun almost completely out of his pocket and leaned toward Ms. Salazar. Both Ms. Salazar and Ms. Villagrana could see the gun. Ms. Salazar then gave Ms. Villagrana the money. Defendant took the money, along with his DVD's and 57 cents in change and left the store.

A call was made to 911, and officers arrived at the store within two minutes. A San Jose police officer went to the area near the store and saw defendant walking down the sidewalk and asked to speak with him. Defendant kept walking past the officer and stopped behind a tree. Defendant then walked out from behind the tree, and the officer

again asked if he could speak to defendant. The officer then pat searched defendant for weapons. During the process of the search, the officer found $296.57 in defendant's pocket. The officer searched behind the tree where defendant had been, and found four DVD's that matched the titles on the receipt for defendant's purchase in the Blockbuster Video store. Defendant's fingerprints were found on the DVD's.

With the assistance of a San Jose Police Department bloodhound, the officers were able to determine defendant's route from the Blockbuster Video store to where the DVD's were found. The route was searched, as well as the dumpsters located along the route, but no gun was ever found.

After defendant was detained, Ms. Salazar and Ms. Villagrana were separately driven to the scene where defendant was being detained. Ms. Salazar told the officer that it was a "very strong[] maybe" that defendant was the robber, but she was unable to positively identify him. Ms. Villagrana told the officer that defendant was not the robber, and that the robber was older than defendant and had no facial hair.

At the preliminary hearing in this case, Ms. Salazar, Ms. Villagrana and a customer in the store during the incident, Georgia Gonzales identified defendant as the robber.

Defendant presented no evidence at trial.

Defendant was charged by information with second-degree robbery, with an additional allegation of personal use of a firearm (Pen. Code, §§ 211-212.5, subd. (c), 12022.53, subd. (b)), and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).[1] The information also alleged that defendant had suffered three prior prison terms. (§ 667.5, subd. (b)). Defendant pleaded not guilty to both charges and denied the special allegations.

[1] All further statutory references are to the Penal Code.

After trial, the jury convicted defendant of both charges and found additional enhancements true. Defendant was sentenced to the upper term of five years for the robbery, and an additional 10 years for the personal use of a firearm enhancement. The court imposed a concurrent term of two years for the ex-felon in possession of a firearm conviction and an additional two years for two of the prison priors, dismissing the third prison prior in the interests of justice.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant asserts the following errors on appeal: (1) the evidence at trial was insufficient to support a finding that defendant possessed a real firearm; (2) defendant was denied effective assistance of counsel by his attorney's failure to request a limiting instruction related to defendant's prior conviction; (3) defendant's sentence violated both Penal Code section 654, and (4) the prohibition against the use of untried facts to support an upper-term commitment pursuant to *Blakely*.

I. *Insufficient Evidence that the Firearm was Real for the Purposes of the Enhancement and the Personal use Allegation for the Robbery*

Defendant asserts that there was insufficient evidence to prove beyond a reasonable doubt that the gun was a real firearm.

It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.) To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the substantial evidence test. Under this standard, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578.)

Under principles of federal due process, review for sufficiency of evidence entails

not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)

The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on "isolated bits of evidence." (*People v. Johnson, supra,* 26 Cal.3d at p. 577.)

Here, defendant was convicted in count 1 of second-degree robbery (§ 211-212.5, subd. (c)), and in count 2 of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). Additionally, with respect to count 1, the jury found true an arming allegation (§ 12022.53, subd. (b) [personal use of a firearm]).

As relevant here, section 12022.5 states: "(a) Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years . . . ." Similarly, section 12022.53 states: "(a) This section applies to the following felonies: [¶] . . . [¶] (5) Section 215 (carjacking). [¶] . . . [¶] (b) Notwithstanding any other provision of law, any person who [1], in the commission of a felony specified in subdivision (a), [2] personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply."

The definition of " 'firearm' " as used in sections 12021 and 12022.53 can be found in section 12001, which states: "(b) As used in this title, 'firearm' means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion."

In this case, there was substantial evidence from which a reasonable trier of fact could have concluded that defendant was armed with a real gun. Ms. Salazar testified

that although she had never touched a gun, she had seen guns in films and on television, and the gun defendant was holding looked real. Additionally, Ms. Villagrana testified that she had seen real guns before, and she believed the gun defendant was holding was real. Circumstantial evidence is sufficient to show the character of the weapon used. (*People v. Green* (1985) 166 Cal.App.3d 514, 517.)

Furthermore, California courts have often held that a defendant's statements and behavior while making an armed threat against a victim may warrant a jury's finding that a weapon was loaded. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 12-13.) Here, we believe this reasoning extends to whether or not the defendant used a "real gun" as opposed to a toy. Here, defendant revealed a gun to Ms. Salazar, and when she hesitated to hand over the cash from the cash register, defendant displayed more of the gun, causing Ms. Salazar to give him the cash. From this the jury could have inferred that the gun was real.

Accordingly, we reject defendant's contention that there was insufficient evidence that the gun was a real firearm.

II. *IAC for Trial Counsel's Failure to Request Limiting Instruction on Defendant's Prior Conviction*

Defendant contends that his trial counsel was incompetent in failing to request a limiting instruction as to evidence of his prior conviction. He contends the court should have been asked to give CALJIC No. 2.50 (other crimes evidence may not be used to prove that defendant is a person of bad character or has a disposition to commit crimes), in addition to the standard limiting instruction of CALJIC No. 2.09,[2] which was given in this case.

---

[2] CALJIC No. 2.09 provides: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any other purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

A defendant claiming ineffective assistance of counsel has the burden of showing (1) deficient performance under an objective standard of professional reasonableness and (2) prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Prejudice must be affirmatively proved. " 'It is not enough for the defendant to show that [counsel's] errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*Id.* at pp. 280-281.) If prejudice is not shown, we need not examine the record for proof of deficient performance. (*People v. Hayes* (1990) 52 Cal.3d 577, 612.)

Where, as here, the court admits evidence for a limited purpose, it must, upon request, give an appropriate limiting instruction. (Evid. Code, § 355.) Thus, if trial counsel had requested a limiting instruction, the court would have given it. But it does not necessarily follow that failing to request the limiting instruction constituted deficient performance.

We regard a decision whether to request an instruction limiting the use to which potentially adverse evidence may be put as essentially tactical. Although ideally a well-crafted limiting instruction should assure that the jury will use evidence only for the purposes for which it is admissible, in the real world of trial practice such an instruction will often tend to highlight the adverse evidence without providing an offsetting assurance that the jury will follow the instruction. In other words, the failure to request a limiting instruction concerning the proper use of past criminal conduct does not invariably reflect incompetence, because counsel may not want to emphasize a brief reference to such conduct. (See, e.g., *People v. Freeman* (1994) 8 Cal.4th 450, 495.) A decision not to seek such an instruction would have been rational in the circumstances of record here.

Defendant further contends his trial counsel was ineffective for failing to object to the prosecution's statement during rebuttal that the jury could draw certain conclusions about the gun's reality from the prior conviction. Like the circumstances discussed above regarding counsel's decision not to request a specific limiting instruction when the prior conviction was admitted, we find the decision not to object or request a limiting instruction during the prosecution's rebuttal was also a tactical decision. Specifically, counsel may not have objected in order to keep the jury focused on the actual testimony of the eyewitnesses regarding their observations of the gun. As such, we will not second-guess trial counsel's reasonable tactical decision. (*People v. Carter* (2003) 30 Cal.4th 1166, 1209.)

Defendant has not demonstrated he suffered ineffective assistance of counsel.

III. *Section 654 for the Dual Punishment of the Felon in Possession Conviction and the Arming Enhancement*

Defendant asserts the trial court violated section 654 by imposing a separate term for count 2, felon in possession of a firearm (§ 12021, subd. (a)(1)). He contends that the possession of a firearm offense was indivisible from the firearm use enhancements (§ 12022.53, subd. (b)) imposed in connection with the robbery charged in count 1.

Numerous cases have considered whether possession of a firearm may be separately punished from the use of the same firearm. "The standard for applying section 654 in [such circumstances] was restated in *People v. Venegas* (1970) 10 Cal.App.3d 814. 'Whether a violation of section 12021 . . . constitutes a divisible transaction from the offense in which [the defendant] employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper . . . . [Citation.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 22.)

In *Bradford*, the defendant wrestled a firearm from a police officer and then used that firearm to shoot the officer. The court held that section 654 barred the imposition of separate terms for possession and use of the firearm under those circumstances: "Defendant's possession of [the officer's] revolver was not 'antecedent and separate' from his use of the revolver in assaulting the officer." (*People v. Bradford, supra,* 17 Cal.3d at p. 22; see also *People v. Venegas, supra*, 10 Cal.App.3d 814 [no evidence that defendant possessed firearm before or after shooting victim].)

The Fourth District Court of Appeal held that section 654 did not prohibit separate terms when the defendant used a firearm to commit two robberies, and still had the firearm in his possession when he was arrested 30 minutes later: "A justifiable inference from this evidence is that defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes. [Citation.]" (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413; see also *People v. Killman* (1975) 51 Cal.App.3d 951, 959 [trial court properly imposed separate term for possession of firearm prior to its use during robbery].)

Here, there was substantial evidence to support the trial court's decision to impose separate terms. A reasonable inference based on the evidence is that defendant possessed the gun before he entered the Blockbuster Video store. As such, the commission of the section 12021 violation was complete before the robbery even occurred. Like *Ratcliff*, here there was substantial evidence to support the imposition of separate terms for defendant's possession and use of the firearm.

IV. *Imposition of the Upper Term as a Violation of Blakely*

In sentencing defendant to the upper term, the court used four aggravating factors: (1) the threat of great bodily injury in this case; (2) defendant's prior convictions and the increasing seriousness of the crimes that he has been convicted of; (3) the fact that he was on parole at the time he committed this crime; and (4) the fact that his performance on parole has not been satisfactory.

Defendant claims that, under *Blakely*, he was deprived of his constitutional right to a jury trial when the trial court imposed an upper-term sentence for second-degree robbery. The Attorney General asserts that defendant forfeited any claim of error under *Blakely* by failing to raise the issue below, and that *Blakely* does not apply to California's determinate sentencing laws.

Supreme Court Precedent

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court considered the constitutionality of New Jersey law that permitted an enhancement that could result in potentially double the maximum sentence for possession of a firearm in the event that the judge determined by a preponderance of the evidence that a hate crime had been committed. (*Apprendi, supra*, 530 U.S. at pp. 468-469.) The Supreme Court concluded that the New Jersey practice could not stand, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) This principle, the court explained, derives from two constitutional rights, namely, the right to trial by jury, and the prohibition against depriving a person of liberty without due process of law. (*Id*. at pp. 476-477; see also *Ring v. Arizona* (2002) 536 U.S. 584, 603-609.)

In *Blakely*, at issue was the constitutionality of Washington determinate sentencing laws under which, as applicable to the case before the Supreme Court, a class B felony held a " 'standard range' " of punishment of 49 to 53 months, while another statute authorized the judge to impose an " 'exceptional sentence' " up to a maximum of 10 years, where there existed " 'substantial and compelling reasons justifying an exceptional sentence.' [Citation.]" (*Blakely, supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2535].) The defendant in *Blakely* pleaded guilty to a class B felony by admitting the elements of second-degree kidnapping and domestic-violence and firearm allegations. (*Ibid*.) Although the State recommended sentencing at the "standard range" between 49

and 53 months, the judge, citing the fact that defendant "had acted with 'deliberate cruelty,' " "imposed an exceptional sentence of 90 months—37 months beyond the standard maximum." (*Ibid*.)

Defendant argued on appeal that the Washington sentencing procedure deprived him of his federal constitutional right to a jury trial to determine beyond a reasonable doubt all of the facts required for the sentence imposed. (*Blakely, supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2536].) The court held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. ___ [124 S.Ct. at p. 2537].) The judge had relied on a fact not found by the jury or admitted by the defendant; accordingly the Supreme Court concluded that the sentence in *Blakely* was invalid. (*Id*. at p. ___ [124 S.Ct. at p. 2538].)

Forfeiture

The Attorney General contends that defendant here forfeited his objection to the upper-term sentence by failing to specifically object at the time of the sentencing hearing. The term " 'waiver' " has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) " 'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

The holding in *Apprendi* had been understood to apply to sentence enhancements; before *Blakely* was decided, it was not commonly understood that it had application to aggravating factors in sentencing. Thus, we believe it reasonable that a defense attorney—of course, being unable to foresee the Supreme Court's decision in *Blakely*

decided nearly a year and one-half after sentencing—would not object at sentencing to the court's reliance upon factors not decided by a jury beyond a reasonable doubt in imposing an upper-term sentence. We find no forfeiture due to defendant's failure to object at sentencing, and we will address his claim of *Blakely* error on its merits.[3]

Application of Blakely to Upper Term Sentence

We begin by acknowledging that the question of whether *Blakely* applies to upper-term sentencing may be the subject of future clarification by our Supreme Court.[4] With that prelude, we conclude that defendant's *Blakely* challenge has merit.

In our application of *Blakely* to the sentencing here, we must initially ascertain

---

[3] In the wake of the *Blakely* decision, a number of California appellate decisions have addressed this issue of forfeiture. We have previously rejected forfeiture arguments by the Attorney General in a decision that is not yet final. (See *People v. Ackerman* (2004) 124 Cal.App.4th 184.) The Supreme Court has granted review in a number of cases in which the appellate courts had likewise rejected forfeiture arguments. (See, e.g., *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1583, review granted Jan. 26, 2005, S129344; *People v. Picado* (2004) 123 Cal.App.4th 1216, review granted Jan. 19, 2005, S129826; *People v. Barnes* (2004) 122 Cal.App.4th 858, 879, review granted Dec. 15, 2004, S128931; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369, review granted Dec. 15, 2004, S129050; *People v. Butler* (2004) 122 Cal.App.4th 910, 918-919, review granted Dec. 15, 2004, S129000; *People v. Lemus* (2004) 122 Cal.App.4th 614, 620, review granted Dec. 1, 2004, S128771; *People v. George* (2004) 122 Cal.App.4th 419, 424, review granted Dec. 15, 2004, S128582; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1564-1565, review granted Nov. 17, 2004, S128417.)

[4] The Supreme Court has granted review in two cases involving *Blakely* issues. In *People v. Towne*, review granted July 14, 2004, S125677, the high court will consider, inter alia: "(2) Does [*Blakely]*, preclude a trial court from making findings on aggravating factors in support of an upper term sentence? (3) If so, what prejudicial error standard applies, and was the error in this case prejudicial?" (Supreme Ct. Mins., Feb. 18, 2005, S125677, review granted and issues limited.) The Supreme Court also granted review in *People v. Black*, review granted July 28, 2004, S126182, on these issues: "(1) What effect does *[Blakely*] have on the validity of defendant's upper term sentence? (2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences?" (Supreme Ct. Mins., Feb. 18, 2005, S126182, review granted and issues limited.)

"the prescribed statutory maximum" sentence. (*Apprendi, supra*, 530 U.S. at p. 490.) This " 'prescribed statutory maximum' " is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra*, 542 U.S. at p. __ [124 S.Ct. at pp. 2536-2537].)

Under California's determinate sentencing law, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b); see also Cal. Rules of Court, rule 4.420(a) ["middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation"].) The middle term is thus the "presumptive" sentence, absent aggravating or mitigating factors warranting imposition of an upper-term or lower-term sentence, respectively. (*People v. Ar*auz (1992) 5 Cal.App.4th 663, 666.) Rule 4.421 of the California Rules of Court provides a nonexclusive list of 16 factors in aggravation that the sentencing judge may consider.[5]

---

[5] California Rules of Court, rule 4.421 identifies "[c]ircumstances in aggravation" as: "(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that: [¶] (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime. [¶] (3) The victim was particularly vulnerable. [¶] (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission. [¶] (5) The defendant induced a minor to commit or assist in the commission of the crime. [¶] (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process. [¶] (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed. [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism. [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value. [¶] (10) The crime involved a large quantity of contraband. [¶] (11) The defendant took advantage of a position of trust or confidence to commit the offense. [¶] (b) Facts relating to the defendant, including the fact that: [¶] (1) The defendant has engaged in violent conduct which indicates a serious

Aggravating or mitigating circumstances need be proved to the sentencing judge only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).)

The sentencing provision applicable here specifies that second degree robbery is "punishable by imprisonment in the state prison for two, three or five years." (§ 213, subd. (a)(2).) Defendant argues that the middle term of three years was thus the "prescribed statutory maximum," i.e., "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra*, 542 U.S. at p. __ [124 S.Ct. at p. 2537].)

We conclude that, for purposes of applying *Blakely*, the middle term is the relevant statutory maximum in the absence of the fact of a prior conviction, the jury's finding or defendant's admission of an aggravating factor.[6] In this instance, the court based its finding that the upper term was appropriate upon the following aggravating facts: (1) the threat of great bodily injury in this case; (2) defendant's prior convictions and the increasing seriousness of the crimes that he has been convicted of; (3) the fact that he was on parole at the time he committed this crime; and (4) the fact that his performance on parole has not been satisfactory.

---

danger to society. [¶] (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. [¶] (3) The defendant has served a prior prison term. [¶] (4) The defendant was on probation or parole when the crime was committed. [¶] (5) The defendant's prior performance on probation or parole was unsatisfactory. [¶] (c) Any other facts statutorily declared to be circumstances in aggravation." (Cal. Rules of Court, rule 4.421.)

[6] Our conclusion that the prescribed statutory maximum under California's determinate sentencing law is generally the middle term punishment prescribed by the applicable sentencing statute is consonant with one of our prior decisions that is not yet final. (See *People v. Ackerman*, *supra*, 124 Cal.App.4th 184.) As noted in footnote 4, ante, two cases are pending before the California Supreme Court in which the court has specifically identified the issues before it as including questions concerning *Blakely*'s application to upper-term sentences imposed under California's determinate sentencing law. (See *People v. Towne*, review granted Jul. 14, 2004, S125677; *People v. Black*, review granted Jul. 28, 2004, S126182.)

Thus it appears that selection of the aggravated term depended on findings on facts that were not alleged in the charging pleading, were not eligible for jury trial (apart from death penalty cases under § 190.3) (*People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Wiley* (1995) 9 Cal.4th 580, 586 [no federal or state constitutional right to a jury determination of "the truth of prior conviction allegations that relate to sentencing"]), and were subject to the preponderance of the evidence standard. (Cal. Rules of Court, rule 4.410.) Consequently, the four findings ran afoul of *Apprendi/Blakely* as facts that were used to "increase[] the penalty for a crime beyond the prescribed statutory maximum [and were not] submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 490.) Accordingly, we conclude that it was error under *Blakely* for the trial court to have imposed an upper-term sentence for the conviction for second-degree robbery.

Blakely error must be examined to determine whether the failure to obtain jury findings on the aggravating factors for sentencing was harmless beyond a reasonable doubt. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* test applied to instructional error with regard to element of sentence enhancement].)

In this case, we cannot say that the error under *Blakely* was harmless beyond a reasonable doubt; we cannot conclude that the trial judge's findings in this were supported by overwhelming evidence, making the sentencing error harmless.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for the limited purpose of re-sentencing on the charge in count 1 of second-degree robbery.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.